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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 167

RICHARD WAYNE HART, LARRY LYNN HART and
ALLEN RAY LEONARD,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GEORGE W. WULFF
Leonhardt Building
Oklahoma City, Oklahoma
Attorney for the Petitioner

of Counsel:
H. A. LEATHERMAN
839 N.E. 23rd Street
Oklahoma City, Oklahoma
and
JO-ANN FISHER CORRIGAN
P. O. Box 19231
Oklahoma City, Oklahoma

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UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 5-0030

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard Wayne Hart, Larry Lynn Hart and Allen Ray Leonard, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on April 24, 1969.

OPINIONS BELOW

Pursuant to jury verdict finding the petitioners, and each of them, guilty of entering a federally insured bank with intent to commit larceny, in violation of Title 18, U.S.C., Section 2113(a), judgment and sentence (Ap-

pendix A, pp. i-ix) was entered against them, individually, by the United States District Court for the Western District of Oklahoma on March 15, 1968. The initial opinion of the Court of Appeals (Appendix B, pp. x-xii), filed March 3, 1969, was subsequently withdrawn by said Court and, simultaneously with the filing of respective orders (Appendix C, p. xiii) denying the petition for rehearing theretofore filed and then pending, a revised opinion (Appendix D, pp. xiv-xvi) was filed by the Court of Appeals on April 24, 1969, and is reported at — F.2d —.

JURISDICTION

The petition for rehearing filed on behalf of Richard Wayne Hart, Larry Lynn Hart and Allen Ray Leonard, individually, was denied on April 24, 1969 (Appendix C, p. xiii). Jurisdiction of this Court is invoked under the provisions of Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the uncontroverted police brutality and inhumane treatment of the petitioners by arresting officers, admittedly in violation of constitutional concepts of due process, contaminated the arrest and thereafter poisoned the collection of tangible evidence, so as to suppress and exclude such subsequently acquired evidence, and operates as a resultant bar to the prosecution of the victims.

Whether proof as to value of the object of a felonious taking allegedly attempted, as prohibited by Title 18, U.S.C., Section 2113(b), is essential to the prosecution of

petitioners under Title 18, U.S.C., Section 2113(a), as an element of the offense; and, whether the failure of the respondent-Government to adduce any evidence as to value of the object of such felonious taking allegedly attempted required a directed verdict of acquittal.

3. Whether, in the absence of any evidence as to value of the object of a felonious taking allegedly attempted, petitioners charged with entry of a federally insured bank in violation of Title 18 U.S.C., Section 2113(a) were entitled to have the jury properly instructed as to the element of intent contemplated by the lesser included misdemeanor offense defined by Title 18 U.S.C., Section 2113(b); and, whether the trial court's failure to properly instruct said jury regarding their verdict should they find petitioners, or any of them, guilty of such lesser included misdemeanor offense and said court's refusal to provide proper forms of verdict in accordance therewith, operated to deny to the petitioners, and each of them, the fair and impartial trial to which they are constitutionally entitled.

STATEMENT

A. THE BASIC FACTS: The operative record facts are substantially as follows:

Throughout the evening of October 29, 1967, twelve to fifteen officers of various law enforcement agencies were staked out on surveillance of the Community National Bank, a federally insured bank, located in Warr Acres, Oklahoma (R. 21-23, 52-57, 74). At approximately 1:30 a.m., October 30, 1967, the activity of three subjects was observed by officers on the roof of the bank building,

and upon these subjects' disappearance into the building, officers moved in to surround the exits and apprehend the suspects.

Upon hearing gunshots, petitioner-Richard Hart approached a window, saw the officers outside, and the three petitioners, one by one, then proceeded to surrender themselves to the officers at the direction of Jerry Landsberger, Captain of the Warr Acres Police Department, by coming out unarmed and with their arms raised above their heads, through the hole made in the roof of the building (R. 24-31, 58-75). As the petitioners each reached the roof exit, they were met and taken into custody by two officers of the neighboring Oklahoma City Police Department, and directed to lay face-down on the roof. Although petitioners each followed the directions of the officers, and offered no resistance to their arrest, they were then kicked in the face by these two officers, causing said petitioners to fall off the roof and onto the ground below. Upon reaching the ground, the respective petitioners' hands were handcuffed behind their backs, and when they failed to respond to questioning, they were individually beaten, stomped in their backs and ribs, and kicked in the head by police officers, and the petitioner, Richard Hart, was twice hit over the head with the butt of a shotgun held in the hands of one of the officers (P-T R. 3-26).

On trial of the case, the respondent-Government's evidence consisted primarily of photographs of the interior of the bank building, taken after petitioners were arrested, and tools stipulated to have been found in front of the bank's night-depository vault. (R. 31-36, 38-43, 75-94). There is no evidence on this record to show that the sub-

ject night-depository vault was ever opened, broken into or entered by the petitioners, or any of them. And, there is likewise no evidence on this record as to the amount of money or property said vault contained, if any, when it was subsequently opened and examined by an officer of the bank, upon his being summoned to the scene by police officers, following the arrest of petitioners (R. 5-21).

B. ILLEGAL ARREST ISSUE: Pursuant to an evidentiary hearing, the trial court overruled petitioners' pretrial motion to suppress and exclude evidence obtained incident to their respective illegal arrests. And, during the trial of the case, the petitioners' motion to suppress was repeatedly raised and renewed, being there directed to the specific testimony of each witness produced by the respondent-Government in the prosecution of its case.

The respondent called Don Marley, Vice President of the Community National Bank at Warr Acres, Oklahoma, to testify as its first witness for the prosecution, and immediately following his taking the witness stand, counsel for petitioners lodged the following objection and offer of proof:

> "MR. LEATHERMAN: Comes now the defendants Richard Wayne Hart and Larry Lynn Hart and Allen Leonard, individually and singularly and object to the introduction in this case of any evidence whatsoever, whatever its nature . . . or for whatever it intends to establish, facts, acts, motives or identity, upon which prosecution of each of these defendants is predicated, whether by testimony of the witness alone, or by witness' intangible evidence . . . The defendants each allege and herewith offer to prove the basis of this objection, that each was deprived of his guarantee of due process, equal protection of the law and freedom

> from infliction of cruel and unusual punishment . . . during his arrest by the arresting officers at the time and place alleged in the indictment, at the time and scene of the commission of the alleged crime, in that each was given the full treatment of police brutality without cause or provocation by the arresting officer who immediately, upon the apprehension of the defendant, assumed the role of prosecutor, as jurors, executioners and exercised raw and unbridled police power, inflicting upon the persons of each of the defendants herein a serious, inhuman and grievous wounds in kicking, injuring and hitting each of them with their feet, shotgun and/or pistols; that such illegal and unlawful and unwarranted invasion of the rights of each of the defendants herein, constitute, in effect, a crime, conviction, sentence and execution of the sentence without any other protection, guaranteed by the United States Constitution for the accused, or suspected of the commission of the crime", (R. 5-7).

This same objection was renewed on numerous occasions throughout the trial proceedings, specifically lodged on behalf of the petitioners, and each of them, at the commencement of the direct examination of each witness produced by the respondent, and on each occasion said objection and offer of proof was summarily overruled by the trial court (R. 7-9, 11, 22, 33, 39, 48, 75). In addition, counsel for petitioners made an offer of proof in support of this objection insofar as it regarded the use and exercise of police brutality upon the persons of the petitioners, and counsel for the respondent-Government readily stipulated that such offered testimony would be the same as the evidence produced in support of the petitioners' pre-trial motion to suppress which had been overruled (R. 22). And see (P-T R 1-29).

C. ESSENTIAL ELEMENT OF THE OFFENSE ISSUE: At the close of the respondent-Government's case-in-chief, counsel for petitioners renewed all motions lodged before and during trial of the case, and orally moved the trial court for a directed verdict of acquittal based upon the insufficiency of the evidence produced by respondent, which motion was summarily overruled by the trial court (R. 103).

Petitioners were charged by indictment with entering a bank insured by the Federal Deposit Insurance Corporation with intent to commit larceny, in violation of Title 18, U.S.C., Section 2113(a), which provides in material part, to-wit:

> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, . . .; or
>
> "*Whoever enters or attempts to enter any bank* . . . or any building used in whole or in part as a bank, . . . *with intent to commit in such bank*, . . . or building, or part thereof, so used, *any felony affecting such bank* . . . and in violation of any statute of the United States, or any larceny—
>
> "Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both." (Emphasis supplied.)

Title 18, U.S.C., Section 2113(b) defines a felonious taking, within the scope and meaning of the statute, and differentiates such "felony" from lesser offenses therein contemplated, to-wit:

"(b) *Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100* belonging to, or in the care, custody, control, management, or possession of any bank, . . . *shall be fined not more than $5000 or imprisoned not more than ten years,* or both; or

"Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, management or possession of any bank . . . *shall be fined not more than $1000 or imprisoned not more than one year,* or both." (Emphasis supplied.)

D. LESSER INCLUDED OFFENSE ISSUE: Upon both sides having rested their case, counsel for the petitioners specifically requested, and it was agreed, that the trial court would instruct the jury regarding the law inherent in Title 18, U.S.C., Section 2113, insofar as said statute contemplates and specifically defines a felony as the unlawful taking of "property or money or any other thing of value exceeding $100 . . . ," and a misdemeanor as the unlawful taking of "property or money or any other thing of value not exceeding $100 . . . ," and prescribes the respective punishments to be imposed upon conviction for either of such statutory violations (R. 105-110). Accordingly, the trial court instructed the jury regarding the degree of the two offenses contemplated by the charging statute (R. 115-117), but failed to further instruct the jury regarding the verdict to be returned in the event they found the petitioners, or any of them, guilty of the misdemeanor as a lesser included offense.

At the conclusion of the trial court's instructions to the jury, and before the jury retired to deliberate, counsel for the petitioners raised his objection to the form of verdict presented to the jury, on the ground that the jury was not properly given an opportunity to find the petitioners, or any of them, guilty of the misdemeanor offense as defined by the charging statute and in accordance with the court's instructions, and further renewed his prior objection to the trial court's failure to properly instruct the jury as to the misdemeanor offense (R. 121-122).

E. THE DECISION OF THE COURT OF APPEALS: Petitioners, and each of them, duly perfected their appeal from the judgment and sentence imposed by the trial court to the United States Court of Appeals for the Tenth Circuit. Thereafter, the Court of Appeals affirmed the United States District Court for the Western District of Oklahoma (C.A. Op., pp. xiv-xvi). A petition for rehearing was likewise filed with the Court of Appeals by the petitioners, and was denied (Appendix C, p. xiii).

REASONS FOR GRANTING CERTIORARI

I. Under applicable Oklahoma law, if a person, while being lawfully arrested, resists arrest or attempts to escape, an arresting officer may lawfully use as much force as may be necessary to effect or maintain the arrest or prevent an escape. But where, as here, there is no resistence on the part of the subject being arrested and the officer uses unnecessary force or violence in consummating his arrest, regardless of his intent, that officer will be deemed guilty of an assault and battery. See: *Anneler* v. *State*

(1951), 93 Okla.Cr. 437, 229 P.2d 238. And see: Title 21, Okla.Stat., Sec. 641-646.

Testimony regarding the police brutality exercised by officers at the time of the petitioners' arrests stands uncontroverted on this record (P-T R. 1-29). No one contends that the three petitioners, or any of them, resisted the arrest or made any attempt to escape from the restraint imposed by the twelve to fifteen law enforcement officers surrounding them at the scene of their arrests. Indeed, even after the petitioners' hands had been securely handcuffed behind their respective backs and they were for all practical purposes physically impaired and unable to defend their persons, they were individually beaten by arresting officers, stomped in their backs and ribs, and kicked in the head.

Petitioners, and each of them, contend primarily that by reason of the acts of assault and battery inflicted upon their persons, individually, by the arresting officers, they, and each of them, were deprived of their right to due process, equal protection of the law, and freedom from the infliction upon them of cruel and unusual punishment, in violation of the Constitution and laws of the United States. See: *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S.Ct. 1602; *Escobedo* v. *State of Illinois,* 378 U.S. 480, 84 S.Ct. 1758; and *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407. Petitioners simply contend that where, as here, the uncontroverted record evidence clearly reflects that the arresting officers' conduct was illegal insofar as cruel and unusual punishment was inflicted upon the accused persons at the time of their arrest, and without any showing or offer of proof to indicate justifiable cause or excuse, the

exclusionary rule announced in the recent Supreme Court cases cited is sufficient to require that the entire testimony of such officers be suppressed, that the arrest effected by such unlawful conduct and improper activity on the part of such officers be quashed, and that by operation of such estoppel, the accused be, in effect, granted immunity from further prosecution.

It is, of course, fundamental that the protection of all constitutional guarantees inure to all persons equally—those justly suspected and accused as well as the innocent; to offenders as well as the law abiding. And see: *Carroll* v. *United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790 *(dealing with Fourth Amendment prohibition against unreasonable search); Agnello* v. *United States,* 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145, 51 A.L.R. 409; and *United States* v. *Lefkowitz,* 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877, 82 A.L.R. 775. In *Wong Sun* v. *United States, supra,* the Supreme Court observed:

> "In order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, *Boyd* v. *United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, this Court held nearly half a century ago that evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks* v. *United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. The exclusionary prohibition extends as well to the indirect as the direct products of such invasions. *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319. * * *"

Both the trial court and the Court of Appeals seemed to think that the petitioners here had, as an available

remedy, some civil action against the arresting officers. They reasoned that no statements or confessions having been obtained from the petitioners, or any of them, as a result of the brutality and injury inflicted by officers during the instant arrest and attempted interrogation, there is nothing to exclude or suppress. True, the arresting officers extracted no evidence as a direct result of their abuse of petitioners, but the unlawful conduct of the arresting officers as asserted by petitioners was not denied at the evidentiary hearing conducted upon the pre-trial motions to suppress, and neither was such unlawful conduct on the part of the arresting officers denied during the trial proceedings—such conduct cannot now be doubted. And, while petitioners' contention as to the resultant illegality of their arrest and immunity from prosecution may well be one of first impression, the gravamen of such activities on the part of law enforcement officers and the validity of the asserted denial to petitioners of their constitutional rights to due process, equal protection of the law, and freedom from the infliction upon their persons of cruel and unusual punishment cannot be ignored, and the relief should not be made to rest upon the success or failure of such officers in extracting the incriminating evidence they sought.

All law enforcement officers have the inescapable duty to conduct themselves in a lawful manner during the making of an arrest and while custodian of a prisoner. It is also fundamental that such officers have an equal responsibility, not only to follow the mandates of the courts in properly advising an apprehended and accused person of his constitutional rights, but to guard said accused to

hold inviolate his constitutional right of due process of law, and affirmatively protect such prisoner's person, using whatever force necessary, against the infliction of any cruel and unusual punishment threatened by the populace. And, this responsibility does not rest upon the ultimate guilt or innocence of the accused, nor can it be diminished or adulterated by circumstances surrounding the initial apprehension or the amount of evidence seemingly apparent at the moment of arrest. Instead, this responsibility is inherent in the fundamental principals of due process of law which operate to vouchsafe to every accused individual the presumption of innocence, and prohibits an arresting officer from assuming the role of prosecutor, jury and executioner. And see: *Brown* v. *Mississippi*, 297 U.S. 278; *Spano* v. *New York*, 360 U.S. 315.

Admonishing the misconduct of federal law enforcement agents and applying a similar premise to protect and guarantee to the accused salient and fundamental constitutional rights, raised on the defense of entrapment, the Ninth Circuit Court recently reversed a narcotics conviction in *Carbojal-Portello* v. *United States*, 396 F.2d 944, wherein the Court observed at page 948 of its opinion:

> "The defense of entrapment is not available to everyone who is induced against his prior disposition, to commit a crime. It is available only where such inducement was by, or was occasioned by, a Government agent. It is made available not because inducement negatives criminal intent and thus establishes the facts of innocence; but because Government agents should not be permitted to act in such a fashion. The defense does not so much establish innocence as grant immunity from prosecution for criminal acts concededly committed. * * *"

The Court of Appeals sought refuge from this inquiry, secure in the reliance that federal officers were not involved in the asserted brutality at the time of petitioners' arrest, and concluded that, therefore, no "nexus" existed between the wrongful treatment of the petitioners and the prosecution of the federal offense charged. It is well settled, however, that the question whether evidence obtained by state officers, when sought to be introduced in a federal criminal proceedings, was obtained or is tainted by a violation of the constitutional rights of the accused, or as an incident to his illegal arrest, is to be judged as if the arrest, search and seizure had been made by federal officers. See: *Preston* v. *United States,* 376 U.S. 364, 84 S.Ct. 881, and cases there cited; *Green* v. *United States* (10 C.A.), 386 F.2d 953; *Mathis* v. *United States,* 391 U.S. 1; and *Green* v. *United States* (10 C.A.), — F.2d — (filed May 15, 1969). Thus, it is now manifestly clear that the taint of the police brutality asserted had already contaminated the arrest when the federal agents arrived, and in the petitioners' view, so poisoned the collection of the tangible evidence as to make it and all other evidence which followed the administration of such inhumane treatment by the arresting officers, totally inadmissible. To hold otherwise is tantamount to giving more credence to form than to the objectives of the constitutional prohibition against cruel and inhuman treatment.

II. Title 18, U.S.C., Section 2113(a) does not operate to constitute as unlawful the entry or attempted entry of a federally insured bank. See: *Prince* v. *United States,* 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370, 59 A.L.R.2d 940. And, no one contends that the petitioners, or any of them, com-

mitted the crime of larceny. The petitioners, and each of them, urges as their second point of contention on appeal that the trial court erred in its failure and refusal to direct a verdict of acquittal on their behalf, at the close of the respondent-Government's case-in-chief. Petitioners simply assert that Title 18, U.S.C., Section 2113(b) specifically defines "any felony affecting such bank," contemplated in Title 18, U.S.C., Section 2113(a), as the unlawful taking or carrying away of "property or money or any other thing of value exceeding $100 . . . ," prescribing the punishment therefor; and, that the respondent-Government has the burden of proving, as an essential element of the offense charged, that the value of the object of the alleged attempted taking is in excess of $100. Hence, the respondent having wholly failed to adduce any evidence as to value of the object of the alleged attempted taking, the petitioners, and each of them, were entitled to a directed verdict of acquittal.

III. The trial court instructed the jury regarding the elements of the offense charged, as follows:

> "The word 'felony' as the same is used in these instructions means a crime against the laws of the United States, the punishment for which is imprisonment for more than one year. In this connection, you are instructed that a felony affecting a bank is committed by anyone who takes and carries away, with intent to steal, any property, money or any other thing of value exceeding $100.00 belonging to or in the care, custody or control, management or possession of any bank. However, anyone who takes and carries away with intent to steal any property or money or any other thing of value not exceeding $100.00 belonging to or in the care, custody, control, management or pos-

session of any bank, is not committing a felony affecting such bank but only a misdemeanor" (R. 116).

The petitioners, and each of them, finally contend that the trial court erred in its failure to properly instruct the jury regarding the verdict to be returned by them in the even they should find the petitioners, or any of them, guilty of the lesser included misdemeanor offense, inherent in the charging statutes, and in the trial court's further failure and refusal to make available to the jury proper forms of verdict, to provide for the return of such misdemeanor verdict, should they so find.

In *Prince v. United States*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370, 39 A.L.R.2d 940, the Supreme Court recognized a conflict then existing in the decisions of the Circuit Courts regarding Title 18, U.S.C., Sections 2113, which included decisions of the Tenth Circuit. See: Footnote 3, 352 U.S. 322, 324, 77 S.Ct. 403, 405. The Court then proceeded to review the legislative history of the Bank Robbery Act, together with its amendments, and based thereon, judicially interpreted the amendments to add crimes less serious than robbery, toward which such prohibiting statute was primarily directed. The high Court reasoned as follows:

> "Congress provided for maximum penalties of either a prison term or a fine or both for each of these offenses. Robbery remained punishable by 20 years and $5,000. *The larceny penalties were set according to the degree of the offense. Simple larceny could result in 1 year in jail and $1000 fine,* while the maximum for the more serious theft was set at 10 years and $5,000. *No separate penalty clause was added for the crime of unlawfully entering.* It was simply incorporated into the robbery provision. * * *

"It is a fair inference from the wording of the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated fo some reason before completing the crime. *The gravamen of the offense is not in the dct of entering,* which satisfies the terms of the statute even if it is simply walking through an open public door during normal business hours.[9] Rather *the heart of the crime is the intent to steal.* This mental element merges into the completed crime if the robbery is consummated. * * *" *Ibid,* 352 U.S. 322, 326-328, 77 S.Ct. 403, 405-406. (Emphasis supplied.)

And see: Footnote 9 at 352 U.S. 328, 77 S.Ct. 407, wherein it is observed:

"This distinguished the unlawful entry provision in the Bank Robbery Act from a very similar provision relating to Post-Office offenses. 18 U.S.C., § 2115, 18 U.S.C.A., § 2115. This section was held to create an offense separate from a completed post office theft. *Morgan* v. *Devine,* 327 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153."

See also: *Heflin* v. *United States,* 358 U.S. 415, 79 S.Ct. 451.

The construction and interpretation of this statute was recently considered by the Fifth Circuit in *Eakes* v. *United States,* 391 F.2d 287, wherein the Court reversing a conviction obtained on a multiple-count indictment, observed:

"The maximum term of imprisonment, however, which can be imposed for violations of § 2113, subsections (a), (b), and (d), where there has been but one bank robbery, is twenty-five years. These subsections do not create separate offenses; rather, they

create different maximum punishments for a single offense depending on whether aggravating circumstances exist. *Heflin* v. *United States* (CA), 1955, 223 F.2d 371; *United States* v. *Williamson* (5 CA), 1958, 255 F.2d 512, cert. den. 358 U.S. 941, 79 S.Ct. 348, 3 L.Ed 2d 349, *reversed on another ground,* 265 F.2d 236; *United States* v. *Gardner* (7 CA), 1965, 347 F.2d 405, *cert. den.* 382 U.S. 1015, 86 S.Ct. — 15 L.Ed 2d 529; * * *." *Ibid,* 391 F.2d 287, 288.

Despite *Prince and Heflin, supra,* the conflict in Circuit Court decisions regarding the interpretation of Title 18, U.S.C., Section 2113 continues. See: *United States* v. *Poindexter* (6 C.A.), 293 F.2d 329; *Hall* v. *United States* (5 C.A.), 356 F.2d 424; *Smith* v. *United States* (8 C.A.), 356 F.2d 868, *cert. den.* 385 U.S. 820, 87 S.Ct. 44, 17 L.Ed.2d 58; and *Clark* v. *United States* (10 C.A.), 281 F.2d 230, and cases there cited. See also: *Purdom* v. *United States* (10 (C.A.), 249 F.2d 822, Judge Bratton dissenting in reliance on *Prince* v. *United States, supra. But Cf. Clonce* v. *United States* (10 C.A.), 356 F.2d 912. Unfortunately, most available case law following *Prince* and *Heflin, supra,* has arisen in the disposition of motions lodged before the courts under Title 28 U.S.C., Section 2255 or Rule 35, F.R.C.P., thereby seeking to correct sentences imposed upon multiple-count indictments or informations. This factor has undoubtedly contributed to the apparent disparity of decisional law presently existing among the Circuits. It is, however, manifestly plain in *Prince, supra,* that the charging statute, *i.e.,* Title 18, U.S.C., Section 2113, is not directed toward the "entry" of a bank, and it cannot, therefore, be construed to constitute such entry unlawful, regardless of the means used by the accused to obtain access to the interior of the bank building.

The petitioners were arrested from inside the bank, but the building was not occupied, no violence accompanied their entrance, nor can any of the surrounding circumstances be said to have been aggravated in any manner by petitioners, or any of them. The petitioners, and each of them, are shown by the record evidence to have entered the bank under circumstances relied upon by the respondent-Government to show an intent to unlawfully take and carry away the contents from a night-depository vault located within such bank, which vault was never entered, and regarding which there is absolutely no evidence to indicate the amount of money or value of property contained therein, if indeed such vault was not empty. Hence, the gist of the offense in the case at bar is an incomplete act, *i.e.*, an attempt to commit larceny or some unlawful taking from the night-depository vault located within an unoccupied federally insured bank.

Once inside the bank building under *Prince, supra,* Title 18, U.S.C., Section 2113(a) becomes inapplicable in the case at bar, insofar as this particular subsection contemplates the completed act of larceny. Title 18, U.S.C., Section 2113(b), which defines and governs all other unlawful takings, prescribing the punishments therefor, is thus controlling here. This subsection operates to create two additional degrees of "taking," each being made to depend upon the monetary value of the object of such crime. The object of the taking in the case at bar is the contents of the night-depository vault, but as we have seen, there is no evidence on this record to show its value.

The petitioners are entitled to the benefit, if any there be, of a lesser included offense inherent in the charging

statute. Due to the failure of the respondent-Government to produce any evidence regarding value of the contents of the night-depository vault, a properly instructed jury, resolving its doubt in favor of the accused, might well have concluded that the intended or attempted taking had as its object money or property *not exceeding $100.00 in value,* and thus return a verdict finding the petitioners, and each of them, guilty of the misdemeanor offense. Moreover, as we have seen, the trial court undertook to instruct the jury regarding the degree of the two offenses contemplated by the charging statute (R. 115-117), and his failure then to further instruct the jury regarding the verdict to be returned in the event they should find the petitioners, or any of them, guilty of the lesser included offense, together with said court's refusal to provide proper forms of verdict in accordance therewith, was tantamount to a directed verdict of guilty.

CONCLUSION

The raw and unbridled police brutality and abuse inflicted upon the persons of the petitioners, and each of them, stands uncontroverted on this record, as having been administered by the arresting officers, and such inhumane treatment of the petitioners is stipulated by the respondent-Government without any attempt whatsoever to show cause or provocation, to excuse or justify the conduct of such officers. It thus seems abundantly clear that the actions of such police officers at the time of the petitioners' arrests was criminal in character, and certainly constitutes a flagrant violation of the constitutional rights of the petitioners, and each of them, sufficient to warrant the sup-

pression and exclusion of the entire testimony of every law enforcement officer present at the scene of the instant arrests, whether such officer participated in the assault and battery upon the petitioners, and each of them, or whether he merely stood by and permitted the occurrence. True, the relief sought is drastic and would operate to immune the petitioners, and each of them, from further prosecution in this case regardless of their guilt, but it would more importantly operate as an effective deterrent against the reoccurrence of such unwarranted police brutality and abuse.

The trial court seemed to think the value of the property contained within the night-depository vault, sought by the respondent-Government to be established as the object of the petitioners' intended taking, was an essential element of the offense charged (R. 122). If this be true, then said court erred in its failure to direct a verdict of acquittal on behalf of the petitioners, and each of them, for the reason that the respondent-Government wholly failed to elicit any evidence tending to show that the contents of such vault exceeded $100 in value. If, however, the value of the object of the petitioners' taking is, under the prohibitory statute, a question of fact for the jury to determine, then, the trial court erred in its failure to properly instruct the jury regarding their verdict, should they find the contents of such vault did not exceed $100 in value, and further erred in its refusal to make available to the jury proper forms of verdict to enable them to return their verdict finding the petitioners, and each of them, guilty of the lesser included misdemeanor offense. In short, the trial court was here required to determine the precise question

whether, under Title 18, U.S.C., Section 2113, value of the object of a so-called felonious taking constitutes an essential element of the offense charged, or whether such fact is for the jury to determine and operates to establish the degree of crime. We think the trial court evaded the issue entirely, as did the Court of Appeals, denying to the petitioners, and each of them, benefits inherent in the charging statute.

Respectfully submitted,

GEORGE W. WULFF
Leonhardt Building
Oklahoma City, Oklahoma
Attorney for the Petitioner

of Counsel:
H. A. LEATHERMAN
839 N.E. 23rd Street
Oklahoma City, Oklahoma
and
JO-ANN FISHER CORRIGAN
P. O. Box 19231
Oklahoma City, Oklahoma

May, 1969

APPENDIX A

FILED
MAR 15 1968
VERA L. HOWARD
CLERK, U. S. DISTRICT COURT
By (s) La Donna Smith
DEPUTY

Judgment and Commitment (Rev. 7-52) Cr. Form No. 25

United States District Court

FOR THE

WESTERN DISTRICT OF OKLAHOMA

United States of America

v.

RICHARD WAYNE HART

No. 68-45-Criminal

On this 15th day of March, 1968 came the attorney for the government and the defendant appeared in person and[1] by his attorney, H. A. Leatherman, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty — — — of the offense of violation of Title 18, U. S. C., Section 2113 (a); (Entering a bank insured by the Federal Deposit Insurance Corporation with intent to commit larceny), as charged in the one count of the Indictment

and his attorney whether they have

~~X charged~~[3]

and the court having asked the defendant ~~whether he has~~ anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] ten (10) years on the one count of the Indictment, or until the defendant is otherwise discharged as provided by law.

IT IS ORDERED that the defendant be granted a stay of execution to Noon, March 19, 1968 and the defendant's Appearance Bond will be exonerated.

IT IS FURTHER ORDERED that the appeal bond of the defendant be fixed in the amount of $15,000.00.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Fred Daugherty

Fred Daugherty, *United States District Judge.*

The Court recommends commitment to: [6]

Vera L. Howard, Clerk

By /s/ LaDonna Smith

Deputy *Clerk.*

[1]Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run con-

currently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

ATTEST: A true copy of the original
Vera L. Howard, Clerk
By /s/ Irene Higginbotham
Deputy 5-16-69

(SEAL)
United States District Court
Western District of Oklahoma

APPENDIX A

FILED
MAR 15 1968
VERA L. HOWARD
CLERK, U. S. DISTRICT COURT
By (s) La Donna Smith
DEPUTY

Judgment and Commitment (Rev. 7-52) Cr. Form No. 25

United States District Court

FOR THE

WESTERN DISTRICT OF OKLAHOMA

United States of America

v.

LARRY LYNN HART

No. 68-45-Criminal

On this 15th day of March, 1968 came the attorney for the government and the defendant appeared in person and[1] by his attorney, H. A. Leatherman, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty — — — of the offense of violation of Title 18, U. S. C., Section 2113 (a), (Entering a bank insured by the Federal Deposit Insurance Corporation with intent to commit larceny), as charged in the one count of the Indictment

and his attorney whether they have

~~as charged~~[3]

and the court having asked the defendant ~~whether he has~~ anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] ten (10) years on the one count of the Indictment, or until the defendant is otherwise discharged as provided by law.

IT IS ORDERED that the defendant be granted a stay of execution to Noon, March 19, 1968 and the defendant's Appearance Bond will be exonerated.

IT IS FURTHER ORDERED that the appeal bond of the defendant be fixed in the amount of $15,000.00.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Fred Daugherty

Fred Daugherty, *United States District Judge.*

The Court recommends that[6]

Vera L. Howard, Clerk

By /s/ LaDonna Smith

Deputy *Clerk.*

[1]Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run con-

currently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

ATTEST: A true copy of the original
Vera L. Howard, Clerk
By /s/ Irene Higginbotham
Deputy 5-16-69

(SEAL)
United States District Court
Western District of Oklahoma

[APPENDIX]

FILED
MAR 15 1968
VERA L. HOWARD,
CLERK, U. S. DISTRICT COURT
By (s) La Donna Smith
DEPUTY

Judgment and Commitment (Rev. 7-52) Cr. Form No. 25

United States District Court

FOR THE

WESTERN DISTRICT OF OKLAHOMA

United States of America

v.

ALLEN RAY LEONARD

No. 68-45-Criminal

On this 15th day of March, 1968 came the attorney for the government and the defendant appeared in person and[1] by his attorney, H. A. Leatherman, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty — — — of the offense of violation of Title 18, U. S. C., Section 2113 (a), (Entering a bank insured by the Federal Deposit Insurance Corporation with intent to commit larceny), as charged in the one count of the Indictment

and his attorney whether they have ~~as~~ charged[3].

and the court having asked the defendant ~~whether he has~~ anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] ten (10) years on the one count of the Indictment, or until the defendant is otherwise discharged as provided by law.

IT IS ORDERED that the defendant be granted a stay of execution to Noon, March 19, 1968 and the defendant's Appearance Bond will be exonerated.

IT IS FURTHER ORDERED that the appeal bond of the defendant be fixed in the amount of $15,000.00.

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Fred Daugherty

Fred Daugherty, *United States District Judge.*

The Court recommends commitment to:[6]

Vera L. Howard, Clerk

By /s/ LaDonna Smith

Deputy *Clerk.*

[1]Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run con-

currently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court wishing to recommend a particular institution.

ATTEST: A true copy of the original
Vera L. Howard, Clerk
By /s/ Irene Higginbotham
Deputy 5-16-69

(SEAL)
United States District Court
Western District of Oklahoma

—x—

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
MAR 3 1969
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY 1969 TERM

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RICHARD WAYNE HART, Defendant-Appellant.	No. 10187
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LARRY LYNN HART, Defendant-Appellant.	No. 10188
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLEN RAY LEONARD, Defendant-Appellant.	No. 10189

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

H. A. Leatherman (Jo-Ann Fisher Corrigan with him on the brief) for Defendants-Appellants.

John W. Raley, Jr. (Andrew Potter, United States Attorney, with him on the brief) for Plaintiff-Appellee.

Before MURRAH, Chief Judge, SETH, Circuit Judge, CHRISTENSEN, District Judge.

PER CURIAM

The appellants were apprehended inside the Community National Bank of Warr Acres, Oklahoma, by city and county enforcement officers, at about 2 a.m. They had gained entry by tearing a hole in the roof. Acetylene torches, drills, other burglary tools, and a gun were found in the bank subsequent to their arrest. Federal agents later joined state officers for purposes of collecting the tangible evidence. They were indicted and ultimately convicted by a jury of entering a federally insured bank with intent to commit a felony affecting that bank, i.e. larceny of money or property, in violation of 18 U.S.C. §2113(a).

At the outset of the trial, appellants moved to exclude all testimony and all evidence because of the allegedly brutal treatment of the defendants by state officers at the time of their arrest. On the motion to suppress, two of appellants testified that upon their arrest they were kicked and beaten with guns by the police officers. The contention seems to be that this inhumane conduct of the state officers barred prosecution on the federal charge even though no confessions were taken or other evidence obtained by reason of the brutality. The most that can be said for this admittedly novel thesis is that state police brutality so contaminated the processes of criminal justice as to bar prosecution of the victims for the offense for which they were arrested and charged.

Without deciding that in no case could police brutality bar prosecution of the victim, we reject the contention here. There is nothing to indicate that federal officers in

any way participated in or condoned the alleged brutality. There is no nexus between the allegedly wrongful treatment and the prosecution for the federal offenses charged. No confessions were obtained and no other evidence elicited from the accused as a result of this treatment. We do not think it so infected the federal processes as to render prosecution obnoxious to fundamental concepts of criminal justice.

The appellants may have redress under the Civil Rights Act, see Monroe v. Pape, 365 U.S. 167 (1961), or the officers may be subject to criminal liability, see Anneler v. State, 229 P.2d 238 (Okla. 1951). But the prosecution and conviction are not barred.

Appellants also contend that the evidence was insufficient to justify submitting to the jury the appellants' intent to steal from the bank an amount greater than $100.00. The applicable statute provides punishment for anyone who "enter[s] . . . any bank . . . with intent to commit . . . any felony affecting such bank . . . or any larceny", §2113(a). The jury was told that unless they found that appellants entered the bank with the intent to steal property valued at more than $100.00, they should acquit them. [This instruction was erroneous in view of the language of the statute which makes it an offense to intend to steal property valued at more than $100.00 or "any larceny." See Pinkey v. United States, 380 F.2d 882, 885 (5th Cir. 1967).]

As the case comes to us, however, the instructions of the court are the law of the case and a finding of intent to steal property valued in excess of $100.00 is essential to conviction. But, even so, the jury could have, indeed, reasonably found that appellants entered a federally insured bank at 2:00 a.m. with the intent to steal more than $100.00. See Pinkey, supra.

The judgment is affirmed.

APPENDIX C

MARCH TERM, APRIL 24th, 1969.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Oliver Seth, Circuit Judge, and Honorable A. Sherman Christensen, District Judge.

United States of America,
Plaintiff-Appellee,
vs. 10187
Richard Wayne Hart,
Defendant-Appellant.

Upon consideration of the petition for rehearing it is ordered that the petition be and is hereby denied.

United States of America,
Plaintiff-Appellee,
vs. 10188
Larry Lynn Hart,
Defendant-Appellant.

Upon consideration of the petition for rehearing it is ordered that the petition be and is hereby denied.

United States of America,
Plaintiff-Appellee,
vs. 10189
Allen Ray Leonard,
Defendant-Appellant.

Upon consideration of the petition for rehearing it is ordered that the petition be and is hereby denied.

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit
APR 24 1969
WILLIAM L. WHITTAKER
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH 1969 TERM

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 10187
RICHARD WAYNE HART, Defendant-Appellant.	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 10188
LARRY LYNN HART, Defendant-Appellant.	)	

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 10189
ALLEN RAY LEONARD, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

H. A. Leatherman (Jo-Ann Fisher Corrigan with him on the brief) for Defendants-Appellants.

John W. Raley, Jr. (Andrew Potter, United States Attorney, with him on the brief) for Plaintiff-Appellee.

Before MURRAH, Chief Judge, SETH, Circuit Judge, CHRISTENSEN, District Judge.

PER CURIAM

The appellants were apprehended inside the Community National Bank of Warr Acres, Oklahoma, by city and county enforcement officers, at about 2 a.m. They had gained entry by tearing a hole in the roof. Acetylene torches, drills, other burglary tools, and a gun were found in the bank subsequent to their arrest. Federal agents later joined state officers for purposes of collecting the tangible evidence. They were indicted and ultimately convicted by a jury of entering a federally insured bank with intent to commit a felony affecting that bank, i.e. larceny of money or property, in violation of 18 U.S.C. §2113(a).

At the outset of the trial, appellants moved to exclude all testimony and all evidence because of the allegedly brutal treatment of the defendants by state officers at the time of their arrest. On the motion to suppress, two of appellants testified that upon their arrest they were kicked and beaten with guns by the police officers. The contention seems to be that this inhumane conduct of the state officers barred prosecution on the federal charge even though no confessions were taken or other evidence obtained by reason of the brutality. The most that can be said for this admittedly novel thesis is that state police brutality so contaminated the processes of criminal justice as to bar prosecution of the victims for the offense for which they were arrested and charged.

Without deciding that in no case could police brutality bar prosecution of the victim, we reject the contention here. There is nothing to indicate that federal officers in

any way participated in or condoned the alleged brutality. There is no nexus between the allegedly wrongful treatment and the prosecution for the federal offenses charged. No confessions were obtained and no other evidence elicited from the accused as a result of this treatment. We do not think it so infected the federal processes as to render prosecution obnoxious to fundamental concepts of criminal justice.

The appellants may have redress under the Civil Rights Act, see Monroe v. Pape, 365 U.S. 167 (1961), or the officers may be subject to criminal liability, see Anneler v. State, 229 P.2d 238 (Okla. 1951). But the prosecution and conviction are not barred.

Appellants also contend that the evidence was insufficient to justify submitting to the jury the appellants' intent to steal from the bank an amount greater than $100.00. The applicable statute provides punishment for anyone who "enter[s] . . . any bank . . . with intent to commit . . . any felony affecting such bank . . . or any larceny.", §2113(a). The jury was told that unless they found that appellants entered the bank with the intent to steal property valued at more than $100.00, they should acquit

As the case comes to us the unchallenged instructions of the court are, of course, the law of the case, and a finding of intent to steal the property valued in excess of $100.00 is essential to conviction. And we think the jury could have reasonably found that appellants entered a federally insured bank at 2:00 a.m. with intent to steal more than $100.00.

The judgment is AFFIRMED.